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No. 90-208

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In the
Supreme Court of the United States
October Term, 1989

HENNEPIN TECHNICAL CENTER,
JOINT INDEPENDENT SCHOOL DISTRICT NO. 287,
ROGER LEE, individually and in his official capacity
as Director of HTC,
ED FOLEY, individually and in his official capacity
as Personnel Director of HTC,
and RONALD M. CARTER, individually and in his official
capacity as Superintendent of District No. 287,
Petitioners,

vs.

LINDA J. HAWKINS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
STATEMENT OF THE CASE	2
I. Facts	2
II. Decisions of the courts below	8
REASONS FOR DENYING THE WRIT	9
I. The Court of Appeals properly reversed and remanded the case to the trial court	9
II. Review by the Supreme Court is not warranted as the issues raised are not of sufficient importance	11
CONCLUSION	13



TABLE OF AUTHORITIES

CASES:

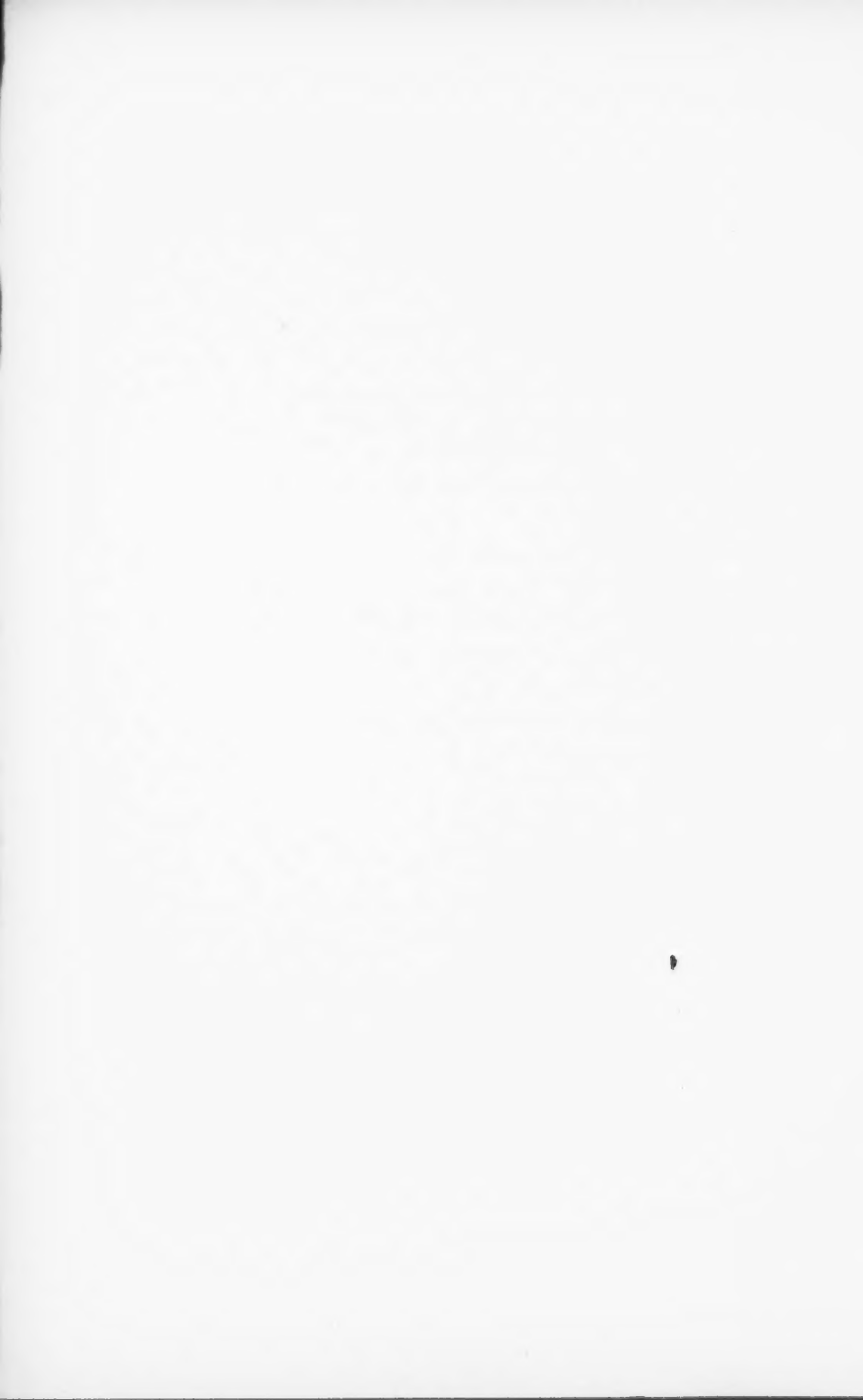
<i>Adickes v. Kress</i> , 398 U.S. 194 (1970).....	10
<i>Estes v. Dick Smith Ford</i> , 856 F.2d 1097 (8th Cir. 1987).....	10, 11
<i>Garza v. City of Omaha</i> , 814 F.2d 553 (8th Cir. 1987).....	10
<i>Hawkins v. Hennepin Technical Center, Joint Independent School District No. 287</i> , 900 F.2d 153 (8th Cir. 1990).....	11, 12
<i>Hunter V. Allis-Chalmers Corp.</i> , 797 F.2d 1417 (7th Cir. 1986).....	11, 12
<i>Monell v. Dept. of Social Services</i> , 436 U.S. 659 (1978)	10
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979)	9
<i>Riordan v. Kempiners</i> , 831 F.2d 690 (7th Cir. 1987)	12
<i>U.S. v. Kahn</i> , 787 F.2d 28 (2nd Cir. 1986)	11

STATUTES:

42 U.S.C. § 1983	8, 9, 10
42 U.S.C. § 2000e	8
Minn. Stat. § 363.01 et. seq.	8

OTHER AUTHORITY:

Fed. R. Evid. 403	11, 12
28 U.S.C. Rules of the S.Ct. 17	11



QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court decline to review the Eighth Circuit Court of Appeals' decision to reverse and remand this case with instructions to admit evidence showing a background of rampant sexual discrimination as relevant to the Respondent's claim that there was a persistent practice of sexual discrimination under color of state law in violation of 42 U.S.C. § 1983?

2. Should the Supreme Court decline to review the Eighth Circuit Court of Appeals' decision to reverse and remand this case with instructions to admit evidence showing a background of rampant sexual discrimination as relevant to the Respondents' Title VII (42 U.S.C. § 2000(e)) and Minnesota Human Rights Act (M.S. Ch. 363.01) claims?

PARTIES TO THE PROCEEDINGS BELOW

See caption of the case.

STATEMENT OF THE CASE

This case presents a common question of admissability of evidence in 42 U.S.C. § 1983, 42 U.S.C. 2000e and state sex discrimination cases. The trial court in this case improperly excluded substantial amounts of relevant testimony from non-parties concerning a background of rampant sexual harassment created by the respondent's co-employee and the administration's (including the individual petitioners) willful attempts to cover up and ignore the harassment.

I. FACTS:

Linda Hawkins is a former employee of the Hennepin Technical Center (HTC). She was employed by HTC as a counselor in June 1977 (Tr. v. II, p. 52). While employed by HTC, she experienced and witnessed several acts of sexual discrimination, including acts of sexual harassment, unequal pay and retaliation for complaints about harassment. She brought a claim uner 42 U.S.C. § 1983, claiming that the Petitioners engaged in a pattern and practice of discrimination against women and thus deprived her of her rights under color of state law. She also brought a claim under the Equal Employment Opportunity Act, 42 U.S.C. § 2000e and the Minnesota Human Rights Act, Minn. Stat. § 363.01, *et seq.*, alleging that she was retaliated against due to her complaints of sexual harassment on behalf of herself and others.

The trial court, *in limine*, excluded evidence referencing alleged acts of sexual harassment of students by David Baranek, a non-party co-worker of the Plaintiff. The court also excluded evidence of another judgment against these Defendants arising out of Baranek's unfettered sexual harassment of many students at the school. The trial court ruled that evidence of sexual harassment was not relevant to the issue of whether or not the Plaintiff was discriminated against in the terms and conditions of her employment and prohibited the introduction of any evidence detailing acts of harassment beyond the fact that complaints of harassment were made. The court also excluded the evidence as irrele-

vant to show custom or pattern of sexual discrimination under 42 U.S.C. § 1983.

The Plaintiff produced substantial evidence of discrimination but was severely limited in her ability to produce evidence of widespread complaints of sexual harassment and the Defendants' active participation in covering up and excusing Baranek's illegal conduct.

Dennis Knapp, a part time instructor, testified that he complained about sexual harassment of students by Baranek to the supervisor and nothing was done about the situation. He was not allowed to go into detail about the complaints or the sexual harassment he witnessed. (Tr. v. I, p. 76-79). Knapp also testified that he told the Defendants about the harassment, that no action was taken, and that he was told that the matter was not his concern. (Tr. v. I, p. 81). After complaining, Knapp was retaliated against by HTC. (Tr. v. I, p. 84-85).

After Knapp's testimony, the court instructed the jury that the evidence of complaints regarding sexual harassment was not evidence of sexual harassment, only that complaints were made. (Tr. v. I, p. 90).

If Knapp has been allowed to testify fully, he would have told the jury of witnessing Beranek sexually harassing Nancy Paulson, a student, by pinning her against the corner in the dental lab, pressing his body against her, coming up behind her and putting his arms around her, kissing her, asking her out, discussing sexual topics on numerous occasions, asking her about her sex life on frequent occasions, discussing his sex life on frequent occasions, placing his hands on her thighs, putting his arms around her shoulder and waist, and that Paulson complained to Knapp about the sexual harassment. He would have also testified that he complained about these things to the supervisor and was told it was none of his business, that he witnessed Beranek retaliate against Paulson after the complaints, that he told Respondent about the complaints, that he complained to the supervisor about the retaliation and was told to mind his own business. Mr. Knapp would have also testified that he observed

similar behavior by Beranek toward Joanne Trader, Becky Rusk and Janet Olson, all students in the dental lab, in terms of sexual harassment and retaliation after complaining; and that the administration took no steps to correct the problems. (Tr. v. I, p. 127-132).

Helen Jirak testified about complaining of sexual harassment by James Rossbach, another supervisor at HTC, but she was not allowed to testify as to what took place and how many times she complained. (Tr. v. I, p. 101-102). After complaining of harassment, Jirak was offered a lower paying job. (Tr. v. I, p. 102-103). When Jirak complained to Defendant Ed Foley, Rossbach's supervisor, Foley became angry and shook Jirak by the shoulders. (Tr. v. I, p. 104). Jirak was also told by Rossbach that she was one of the best teachers he had ever seen but that he did not care unless she "got in line". (Tr. v. I, p. 107).

Had she been allowed to testify fully, Jirak would have testified that Rossbach sexually harassed her on several occasions, including physical touching and comments she found repulsive, and that she complained to Rossbach and his conduct did not stop, that HTC retaliated against her after she complained, and that she heard the Plaintiff complain about Rossbach sexually harassing her. (Tr. v. I, p. 98-99). She would have also testified that Rossbach was in a position of authority over her, that his sexual contact with her included unwanted touching on leg legs and thighs, putting his arms around her, putting his arms around her waist and her shoulders, kissing her without her consent and against her will, on one occasion placing his hands approximately one inch from her breast and telling her that he wanted to touch the buttons on her dress, that Rossbach continually discussed sexual topics, including his own sex life, asking her about her sex life, and making offensive comments about the female anatomy. She also observed Rossbach's conduct toward the Plaintiff and she saw Rossbach touch the Plaintiff in ways similar to his touching of Jirak and she saw the Plaintiff try to stop the touching. In addition, she would have testified that Rossbach would call her into his small office and sit uncomfortably close to her

and that she saw Rossbach retaliate against the Plaintiff after the she complained of the harassment. (Tr. v. I, p. 133-139).

Joanne Trader, a student of Beranek, testified that Beranek sexually harassed her and that she made complaints about the conduct. (Tr. v. I, p. 146-47). She was not allowed to testify about the substance of her complaints or the specifics of the harassment, beyond mentioning that the harassment consisted of verbal comments and touching. (Tr. v. I, p. 152). She also testified that the Plaintiff tried to help her with the harassment problems. (Tr. v. I, p. 148). Trader complained to the supervisor at least four times about the harassment (Tr. v. I, p. 155) and she complained to Roger Lee and Joe Pucel (Tr. v. I, p. 156) who were administrators. After Lee and Pucel did nothing, she complained to the school's sex equity board. (Tr. v. I, p. 160-63).

Had she been allowed, Trader would have testified about the specific incidents of Beranek's sexual harassment and retaliation, including caressing of her shoulders, touching her around the waist, touching her legs including her inner thigh, discussing his sex life with her, asking her about her sex life, asking her out on dates, that she described these incidents to the supervisors and administrators, that Plaintiff and another female instructor, Brigitte Adams, stood up for her and that she was subjected to retaliation. (Tr. v. I, p. 175-79).

Nancy Paulson, a dental lab student, testified that she has problems with Beranek and complained to the school officials, (Tr. v. II, p. 15) but she was not allowed to relate any of the details of the harassment.

Plaintiff testified that she was harassed by Rossbach and complained to him (Tr. v. II, p. 66). She also testified about the lack of complaints regarding her work after she started complaining about the harassment of herself and students. (Tr. v. II, p. 106). She tried to help Trader (Tr. v. II, p. 109-23) and was told by the administration that the sexual harassment was none of her business. (Tr. v. II, p. 124, 138).

Plaintiff, after she began complaining, was moved from one campus to another and then ultimately laid off. When she was told of the impending layoff by a Mr. Tomsley, a supervisor, she was told by Tomsley that he was instructed by the administration to keep an eye on her when she was transferred from another campus. (Tr. v. II, p. 156-57).

Plaintiff's counsel made several offers of proof, all of which were denied by the trial court, in which he sought to introduce testimony of other victims of sexual harassment and retaliation. Kathy Carsensen, a former student, would have testified that Beranek grabbed her buttocks and squeezed it. She would have testified that she complained of this to the school administration and was told to ignore it and that Beranek engaged in frequent and uninvited touching of her back and shoulders, massaging and rubbing her legs, asking her intimate personal questions, and that she told Beranek's supervisor of the harassment. (Tr. v. III, p. 4-5).

Paulette Stueber, and employee of HTC, would have testified that while working alone at the switchboard, Beranek kissed her without consent, that Beranek also would put his arms around her and put his face right next to hers and tried to run his fingers through her hair. She would have also testified that Defendant Roger Lee, the campus director, saw this behavior and she also went to Lee and told him that she did not consent to Beranek's actions. She also complained to Beranek's supervisor and was told by the supervisor that Beranek's conduct was already known to her because of the complaints by Cartensen and that she knew of other complaints about Beranek. Steuber would have also testified that she received a telephone call from Lee in which he told her that all references in Beranek's file concerning the conduct toward Steuber were being removed. (Tr. v. III, p. 5-7).

Cynthia Mendelson, a former student at HTC, would have testified that Beranek sexually harassed her by asking her on dates, talking about his sex life, touching her, rubbing her legs, and touching her chest area. She complained to the supervisor of the department about the

complaints and nothing was done about it. She would have also testified that Beranek retaliated against her after the complaints and that she saw him do the same thing to other females in the dental lab program. (Tr. v. III, p. 7-8).

Janet Olson, a former student, would have testified that Beranek put his hands on her thighs and massaged near her pelvis, caressed her back and shoulders and asked her out on dates. She complained to the supervisor and nothing was done. (Tr. v. III, p. 7-8).

Becky Rusk, a former student, would have testified to similar incidents of sexual touching, comments and propositions by Beranek. She complained to the supervisor and nothing was done. (Tr. v. III, p. 9).

The Plaintiff would have testified that she made a complaint in November 1982 with the Minnesota Department of Human Rights, alleging that Rossbach would have meetings in his small office and touch the Plaintiff's legs and thighs; that he would put his arms around her shoulders and waist; and that he would make comments that were inappropriate. She would have also testified that when she complained about this conduct to Ken Eggert, another administrator, Rossbach learned of it and threatened to "nail her tits to the wall", and told her that she better be loyal to him. (Tr. v. III, p. 11-12).

Brigette Adams, another dental lab instructor, would have testified that she was an eye witness to Beranek's sexual harassment of Paulson, Trader, Sharp, Rusk and several others, that she complained about the harassment to the supervisor, Lee, the superintendent and others. Following her complaints she was retaliated against by Beranek in the form of physical threats and sexual harassment. She complained to the administration about the harassment and the threats and that no effective steps were taken by the administration. (Tr. v. II, p. 19-21).

In her actual testimony, Adams was allowed to tell the jury that she made complaints about sexual harassment to the departmental supervisor, Lee, and Pucel. She also testified that Pucel told her that she was equally at fault for the problems between her and Beranek. (Tr. v. III, p. 145).

She was also told by Pucel and Lee after complaining about Beranek, that she should be more lenient with Beranek because he had such a terrible childhood. (Tr. v. III, p. 148). After complaining to the administration, she was retaliated against by Beranek and the administration. (Tr. v. III, p. 149-51). Adams later filed her own claim of discrimination with the Minnesota Department of Human Rights. After this she returned to the campus as a guest lecturer at the request of a teacher, but prior to her lecture she was escorted off the campus by the administration because of her discrimination charge. (Tr. v. III, p. 162-63).

In his examination of Roger Lee, Plaintiff's counsel was not permitted to elicit the number of complaints Lee had received with respect to the number of female employees alleging sexual harassment (Tr. v. III, p. 207) or the number of complaints from students alleging sexual harassment. (Tr. v. III, p. 207-08).

The remainder of the testimony related to unequal pay based on gender, failure to recall laid off employees who complained about sexual harassment such as Plaintiff and Adams, and transfer of Plaintiff in violation of her bumping rights under the union contract because she complained about sexual harassment of herself and others.

II. DECISIONS OF THE COURTS BELOW

The Plaintiff commenced an action in the United States District Court for the District of Minnesota, Fourth Division. Her 42 U.S.C. § 2000e (1982) and Minn. Stat. § 363.01 *et seq.* claims were heard by the court. The jury heard the 42 U.S.C. § 1983 claim and returned a verdict in favor of the Defendants on December 13, 1988 and judgment was entered on January 6, 1989. The Plaintiff appealed this judgment on February 3, 1989. (*Hawkins v. HTC, et al.*, No. 89-5107MN). The trial court entered judgment on the remaining claims on May 8, 1989 and the Plaintiff took an appeal from that judgment on June 5, 1989. (*Hawkins v. HTC, et al.*, 89-5320MN). The Eighth Circuit joined the two

appeals and remanded the entire case back to the trial court with instructions to admit the excluded evidence and to reconsider its order preventing the Plaintiff's offensive use of collateral estoppel based on the judgment in *Smith, et al. v. HTC, et al.*, Civ. File No. 4-89-411 (D. Minn. May 25, 1988).¹

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING SUBSTANTIAL AMOUNTS OF THE PLAINTIFF'S EVIDENCE.

The issue in this case is not, as stated by the Petitioners on page 9 of their petition, whether trial courts are required to admit all evidence of sexual harassment of and by non-parties in every case where there has been an allegation of sexual discrimination. The issue is whether or not the Eighth Circuit properly determined that the trial court, *in this particular case*, abused its discretion in excluding substantial portions of the plaintiff's case so that she was deprived of a full and fair opportunity to persuade the jury.

Most of the excluded testimony detailed the extensive sexual harassment perpetrated by David Beranek, how he was allowed to continue unfettered by the Defendants, and how the Defendants actively covered up the harassment and tried to suppress those who complained. The trial court found this testimony to be irrelevant and unduly prejudicial and the Eighth Circuit found that it was highly probative of the background of sexual discrimination existing at the school.

In order to prove her Title VII and Minnesota Human Rights Act discrimination claims and her § 1983 claim, the Plaintiff had the difficult burden of persuading the jury that the Defendants' actions were motivated by discriminatory

¹ The Eighth Circuit ordered the trial court on remand to reconsider its order precluding the offensive use of collateral estoppel based on *Park Lane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The Petitioners are not appealing this portion of the Eighth Circuit's decision.

animus. In addition, the Plaintiff had to persuade the jury on her § 1983 claim, that the actions taken against her on account of her gender were part of "persistent practice" or custom of discrimination based on sex. *Adickes v. Kress*, 398 U.S. 164 at 167 (1970); *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987); citing *Monell v. Dept. of Social Services*, 436 U.S. 659, 690-91 (1978). The trial court effectively prevented the Plaintiff from persuading the jury that there was a persistent practice of sexual discrimination by the school officials.

The Defendants argued that the details of the harassment complaints were irrelevant since the harassment was not perpetrated by any of the named defendants. That argument misses the point that sexual discrimination takes many forms, including intentional ignorance, attempted cover up and tacit approval of the conduct by the named defendants. The jury needed to hear the details of Beranek's actions and the complaints made to the Defendants so that they could determine what the Defendants knew and the unreasonableness of their conduct. Had the extent and severity of the sexual harassment allowed to flourish by the Defendants' conduct been explained, the jury may have been persuaded that there was indeed a pervasive gender based animus at the school which influenced the decisions effecting the plaintiff and amounted to a persistent practice.

The fact that some of the witnesses were students as opposed to employees of the school is also irrelevant. The pervasiveness and severity of the conduct show a willful indifference to the rights of all females connected with the school.

In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), the plaintiff was prevented from introducing substantial evidence relating to racial and age based discrimination perpetrated on other employees and customers. The Eighth Circuit reversed the trial court's evidentiary rulings and remanded the case for a new trial holding that "... the District Court's exclusion of Estes's evidence showing a background of race and age bias was improper. . . . Because these evidentiary rulings deprived Estes of a full

opportunity to persuade the jury, we reverse and remand . . .” *Id.* at 1099.

In this case, the Eighth Circuit, consistent with *Estes*, felt that the trial court deprived Hawkins of a full opportunity to persuade the jury. While the trial court is given a great degree of discretion in excluding evidence under Rule 403, the trial court may not unfairly prevent a party from proving its case. *Id.*, at 1102-03. Also, exclusions under Rule 403 are to be used sparingly and all doubts as to admissibility are to be resolved in favor of admission. *U.S. V. Kahn*, 787 F.2d 28 (2nd Cir. 1986).

Therefore, this case is consistent with established practice under Rule 403. There is no requirement that trial courts admit all evidence of discrimination by or against non-parties in all trials. The rule is as it has always been: When the evidence is relevant, trial courts must look at each case individually to determine the probative value of the evidence and exercise due care not to take away the plaintiff's opportunity to persuade the jury.

II. THIS CASE DOES NOT MERIT REVIEW BY THE SUPREME COURT UNDER 28 U.S.C. RULES OF THE SUPREME COURT, RULE 17.1(a), (b) OR (c).

The Supreme Court, pursuant to Rule 17 of the Rules of the Supreme Court only hears cases of great importance. This case falls far short of the importance required for review.

The Petitioners have implied that review of this case is required to resolve a conflict between the Eighth Circuit's decisions in *Hawkins v. Hennepin Technical Center, Joint Independent School District No. 287, et al.*, 900 F.2d 153 (8th Cir. 1990) and *Estes, supra*, and the Seventh Circuit's decision in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986). However, no conflict exist and the writ should be denied.

In *Hunter*, the Seventh Circuit stated that evidence of discrimination against persons other than the plaintiff was admissible. In dicta the Court in *Hunter* stated that:

If Hunter were complaining that he had been paid less than white workers for the same work, evidence of discriminatory behavior of his co-workers toward another black worker *might* have little or no relevance and its probative value (if any) *might* very well be greatly outweighed by its effect in prejudicing the jury against Allis-Chalmers and spinning out the trial to inordinate length.²

Id. at 1424 (emphasis added).

The Seventh Circuit statement that the other incidents of discrimination "might" have little or no relevance is consistent with the Eighth Circuit's decisions in *Estes* and *Hawkins*; that is: The determination as to whether the trial court abused its discretion and unfairly prevented the plaintiff from persuading the jury should be based on the particular facts of each case.

The field of discrimination law is not unique and requires no special determination of Fed. R. Evid. 403. If anything, the difficulty in persuading the fact finder that discriminatory animus was involved in an adverse employment decision, particularly after the employer raises its inevitable and most often plausible legitimate, non-discriminatory justification for its motives, requires that plaintiffs in discrimination cases be given every available opportunity to show, through direct and circumstantial evidence, that the employer's motives were improper. *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987).

Since the unusual and egregious facts of this case are unlikely of widespread repetition, a decision of this Court will be of little consequence to trial courts applying the rules of evidence on a daily basis. Therefore, the Petitioners' application for a writ should be denied.

²The Petitioners claim that the trial in this matter will be too long if all of the evidence is admitted. The length of the trial on remand can be greatly reduced by the offensive use of collateral estoppel because most of the excluded testimony was admitted in the *Smith, et al. v. Hennepin Technical Center, et al.*, *supra*. Reading the *Smith* findings to the jury will obviate the need to call many of the witnesses in this case.

CONCLUSION

The Eighth Circuit properly decided this case by reversing and remanding for a new trial. There are no important questions raised by this appeal which would justify this Court's consideration. To do so would impose a rigid rule on evidentiary matters requiring flexibility or require the Supreme Court to decide evidentiary matters on a case by case basis. The application for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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